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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 752

J. C. BRADFORD ET AL.,
Petitioners,

vs.

MRS. GUILBERTA DAKIN MAGGIORE ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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MRS. GUILBERTA DAKIN MAGGIORE ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioners, Phillips & Buttorff Corporation, Church of Christ Foundation, Inc., First National Company and G. L. Comer, pray that writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered for the Middle District of Tennessee in Docket No. 14,790, and remanding the cause for further proceedings in conformity with the opinion.

OPINION BELOW.

The opinion of the Court of Appeals (Appendix A hereto) has not yet been officially reported.

The findings of fact and conclusions of law (filed October 31, 1960) by District Judge Miller will be found in Brief and Appendix for Defendants-Appellees (U.S. Court of Appeals) pp. 1b-10b.

JURISDICTION.

The judgment of the Court of Appeals was entered on December 4, 1962. The jurisdiction of this Court is invoked under 28 U. S. Code, Sec. 1254.

QUESTIONS PRESENTED.

The several questions presented by this Petition are:

1. Whether the Circuit Court of Appeals for the Sixth Circuit, in its decision violated the mandatory requirements of the Act of Congress passed June 25, 1948, generally known as the "Rule of Decision" law, being 62 Stat. 944, 28 U.S.C.A. 1652, as construed by this Court in *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538 (85 L. Ed. 327), by failing to consider and give effect to *Creighton, Trustee, v. Hayes et al.*, 209 Tenn. 364, decided and published by the Supreme Court of Tennessee after the decision of the District Court and pending the decisions on appeal in this cause.

2. Whether Rule 52 of the Federal Rules of Civil Procedure required the Circuit Court of Appeals to accept and approve the factual findings and conclusions of the District Judge (the case having been heard by the District

Judge without a jury); or whether, notwithstanding said Rule 52 and the decision of this Court in *Commissioner* v. *Duberstein*, 363 U.S. 278, 291, the Circuit Court of Appeals was entitled to draw its own conclusions *de novo*.

FEDERAL STATUTE INVOLVED.

The Act of Congress, June 25, 1948, 62 Stat. 944, 28 U.S.C.A. 1652, is as follows:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c. 646, 62 Stat. 944."

RULE INVOLVED.

So far as pertinent, Rule 52 (Federal Rules of Civil Procedure) is as follows:

> "Rule 52. Findings by the Court.
>
> "(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. *Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.* . . ."
>
> (Emphasis added.)

STATEMENT.

Phillips & Buttorff Corporation, hereinafter referred to as P & B, purchased for $2,700,000, which was at the rate of $45 a share, the controlling stock of Wm. R. Moore Dry Goods Company, herein referred to as Moore. P & B was engaged in the manufacturing and merchandising business and Moore in the merchandising business. P & B suffered substantial operating losses after this purchase, and rather than borrow funds by mortgaging its real estate, sold the Moore stock back to its majority stockholder from whom it had been purchased, at the same price of $45 per share, in order to replenish working capital. Meanwhile, non-resident minority stockholders had, without prior demand on the directors, brought a suit to rescind the transaction, basing federal jurisdiction on diversity of citizenship, and contending that the purchase of the Moore stock by P & B was at an excessive price and disadvantageous to P & B. After the sale of the Moore stock by P & B *without loss* Plaintiffs amended the complaint so as to seek to recover from the directors and majority stockholder the amount of P & B's operating losses and to have a receiver appointed.

After hearing oral testimony in open court of numerous witnesses for the defendants, without a jury, and hearing discovery depositions taken by plaintiffs, the District Court found the facts specially, stated separately its conclusions of law thereon, and directed the entry of judgment dismissing the complaint, as amended.

The Court of Appeals reversed and remanded the case and directed the District Court to consider, in the light of the opinion, the award of attorneys' fees to plaintiffs' attorneys, to be paid by the corporation, and a recovery for the benefit of the corporation of interest at the rate of 6% on $2,700,000 between the date the suit was commenced and

the date the Moore stock was sold, less the dividends paid on the Moore stock during this period.

In reversing the decision of the District Court, the Court of Appeals expressly sustained, as "not clearly erroneous," a finding of the District Court[1] that P & B's operating losses "were not attributable in whole or in part to the Moore purchase." But the Court of Appeals set aside the affirmative "good faith" finding of the District Judge and held that the Moore purchase was "prejudicial" to the corporation and minority stockholders (1) because P & B converted certain assets into cash and borrowed additional money to complete the purchase, and (2) because the proceeds of the sale were used by the majority stockholder to finance the purchase of the controlling interest in P & B. That being the case, the Court of Appeals characterized the transaction as involving "constructive fraud" and said that the persons participating had engaged in a "conspiracy" to do an "illegal" act. There was, however, no finding of fact by the Court of Appeals that the Moore purchase was intrinsically *unfair* or *disadvantageous* to P & B, *nor did the Court point out any error* whatever in the District Court's finding on this subject, which was as follows:[2]

> "9. The Moore purchase, at the time it was made, was advantageous to P & B for several reasons. The asset value of the stock was approximately $69 per share exclusive of leasehold improvements having a book value of approximately $4 per share. Approximately $26 a share of this amount represented valuable Memphis real estate. There was room for improvement in the earnings of Moore and its subsidiaries, based on the volume of sales, but on the basis of current earnings, the stock was fairly valued at $45 a

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1. Finding 6, Appellee's Appendix, 6b.

2. Appellee's Appendix, 8b.

share, bearing in mind the amount of real estate owned, on which a small return would be normal. Through this purchase the minority stockholders of P & B obtained needed diversification and P & B obtained outlets for its products through Moore's subsidiaries engaged in the wholesale and retail business. One of the subsidiaries, Keith-Simmons Co., Inc., is an important wholesale hardware company. The sale of the miscellaneous stocks and bonds was not a disadvantage to P & B. With the exception of the investment trust shares, these securities sold at a loss and would have declined further in value if they had been retained. The investment of funds of a manufacturing enterprise in investment trust shares was abnormal, requiring an investor in P & B stock to pay twice for investment advice. The opportunity to purchase 51% of the Moore stock from the owner of 99% was unusual, and was afforded to P & B because the Foundation had the option to acquire control of P & B. Weighing the advantages against any possible disadvantage to P & B, the Court finds as a fact that the transaction was both fair and advantageous to P & B and its minority stockholders. Although the market price of P & B stock declined substantially after the Moore purchase, this decline was not attributable to that transaction, but rather to the operating losses."

On the trial the Petitioners offered numerous witnesses who testified as to the various matters included in the above quoted finding No. 9. *Their testimony was undisputed.* Thus, the various facts set out in finding 9, and the *factual inferences* therefrom stand not only supported by the substantial testimony of the various witnesses observed by the trial judge; they stand *undisputed* by any substantial evidence; and there is no conflict in the evidence concerning them.

The Circuit Court of Appeals, however, gave no recognition to this posture of the record; rather, it *avoided*

consideration of finding 9. In its opinion it stated that "the controlling evidence was uncontroverted," and that it "remained only for the Court to determine the legal consequences". Thus, the Court regarded the fairness and advantageousness of the transaction as involved "legal consequences" rather than "factual inferences".

The Circuit Court of Appeals in its opinion said that "the controlling evidence was uncontroverted," and that it "remained only for the Court to determine the legal consequences." Thus the Court of Appeals regarded the fairness and advantageousness of the transaction as involving "legal consequences" rather than factual inferences. The Court of Appeals thereby avoided consideration of Finding 9 of the District Court.

REASONS FOR GRANTING WRIT.

1. A majority stockholder is not guilty of "constructive fraud" or of participating in a "conspiracy" to perform an "illegal" act, by engaging in a transaction with the corporation which is fair and advantageous to the corporation, even if it enables the majority stockholder to finance the purchase of the controlling stock of the corporation. Under Tennessee law, as declared by the State's highest court, a transaction between a corporation and its majority stockholder must be sustained if it is found to have been fair and advantageous to the corporation when it took place. (*Carrier* v. *Dixon*, 142 Tenn. 122) The case cited by the Court of Appeals, *Gillespie* v. *Brannam*, 47 Tenn. App. 234, was decided by an intermediate court and is not authoritative in a diversity case. *Citizens State Bank* v. *American Fire & Casualty Co.*, (5 Cir., 1952) 198 F.2d 57; *United States* v. *Norsam Realty Corp.*, (2 Cir., 1942) 125 F.2d 456; *Keehn* v. *Excess Ins. Co. of America*, (7 Cir., 1942)

129 F.2d 503. Moreover, in *Gillespie* v. *Branham*, the sole minority stockholder objected; in this case, a majority of the minority stockholders voted with the majority. (District Court's Finding 4)[3]

This being a case where federal jurisdiction rested solely and exclusively upon diversity of citizenship, it was mandatory that the law of Tennessee be applied under the Federal Statute hereinabove set out, and this mandatory requirement applies to decisions of the Supreme Court of Tennessee rendered *subsequently* to the decisions of the District Court and in full effect at the date of determination by the Circuit Court of Appeals. (*Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U.S. 538, 85 L. Ed. 327); such a case was *Creighton, Trustee*, v. *Hayes et al.*, 209 Tenn. 364, decided February 8, 1961, after the decision of the District Court and decided and published before the decision of the Court of Appeals.

2. The Circuit Court of Appeals decision violates Rule 52 of the Federal Rules of Civil Procedure as construed by this Court in *Commissioner of Internal Revenue* v. *Duberstein*, 363 U.S. 278, 291, where it was held that the "clearly erroneous" rule "applies to factual inferences from undisputed basic facts." The Court of Appeals erred in treating as "legal consequences" what were actually "factual inferences." Factual inferences drawn by a District Court may not properly be disregarded by giving them a different name.

The Circuit Court of Appeals erred in reversing the decision without considering whether Finding 9 of the District Court was or was not "clearly erroneous" within Rule 52, and without giving "due regard to the opportunity

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3. Appellee's Appendix, 3b.

of the trial court to judge of the credibility of the witnesses" as the rule requires.

The Circuit Court of Appeals improperly substituted its view that the transaction was "prejudicial" and "illegal" for the District Court's finding of fact that it was "fair and advantageous." This Court should grant certiorari in a non-jury case where the trial judge's function in drawing inferences from proven facts has not been respected, for the same reason that it grants certiorari in jury cases where the jury function has not been respected. Cf. *Wilkerson* v. *McCarthy*, 336 U.S. 53.

3. The decision of the court below involves an important question of Federal law and procedure which the Court decided contrary to the decision of this Court (*Commissioner of Internal Revenue* v. *Duberstein*, 363 U.S. 278, 291) and contrary to the applicable law of Tennessee as declared by its Supreme Court (*Creighton, Trustee*, v. *Hayes et al.*, 209 Tenn. 364) and procedural questions arising out of the interpretation of Rule 52 of the Federal Rules of Civil Procedure which the Court below decided contrary to its own previous decisions (*Tracy* v. *Finn Equipment Co.*, 290 F.2d at 498; *C.I.R.* v. *Spermacet Whaling & Shipping*, 281 F.2d 646; *Rich* v. *Pappas*, 299 F.2d 308).

4. A serious conflict in the construction and application of the Federal Rule of Decision Statute and the construction of Rule 52 of the Federal Rules of Civil Procedure exists among the various Circuit Courts of Appeal which ought to be settled by this Court, and which apparently the Circuit Courts of Appeal do not regard as having been settled by this Court in *Commissioner of Internal Revenue* v. *Duberstein*, 363 U.S. 278. See, for example, decision in *C.I.R.* v. *Spermacet Whaling and Shipping*, 281 F.2d 646, at page 651. Quite recently, the Seventh Circuit, in *Pflugardt* v. *U. S.*, decided December 4th, 1962.

and not yet reported, called attention to the fact that the Seventh, Third and Fifth Circuits were in agreement, but that the Second Circuit took a contrary view in Austin v. C. I. R., 298 Fed. 2d 583, disagreeing with the Sixth Circuit.

CONCLUSION.

For the foregoing reasons this petition for the writ of certiorari should be granted.

Respectfully submitted,

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Nos. 14790, 14823.

United States Court of Appeals

FOR THE SIXTH CIRCUIT

MRS. GUILBERTA DAKIN MAGGIORI, et al.,
Plaintiffs-Appellants,
v.
J. C. BRADFORD, et al.,
Defendants-Appellants.

APPEAL from the United States District Court for the Middle District of Tennessee, at Nashville.

Decided December 4, 1962.

(Filed December 4, 1962. Carl W. Reuss, Clerk.)

Before: Cecil, Chief Judge, Weick, Circuit Judge, and Taylor, District Judge.

Weick, Circuit Judge. The suit in the District Court was a stockholders derivative action. It was brought by minority stockholders of Phillips & Buttorff Corporation, a Tennessee corporation,[1] to rescind a transaction whereby the controlling shareholders of P & B (hereinafter referred to as Comer Group) financed the purchase of their stock with funds derived from their sale to P & B of 60,000 shares of an unlisted stock owned by them in Wm. R. Moore Dry Goods Company[2] of Memphis, Tennessee for $2,700,000.

The complaint alleged conspiracy and fraud and charged a violation of the fiduciary duty owing by con-

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1. Phillips & Buttorff Corporation will be referred to as P & B.

2. Wm. R. Moore Dry Goods Company will be referred to as Moore.

trolling shareholders. It averred that the assets of P & B were wrongfully depleted by the transaction to the detriment of P & B and the minority shareholders.

The transaction complained of was handled in a somewhat circuitous manner. Brokers, who were made defendants in the action, acquired the shares of P & B on the order of Guy L. Comer with temporary financing. The shares were placed in the name of Church of Christ Foundation, a corporation not for profit, of which Mr. Comer was a trustee. Woodstock Corporation, a Comer company, with the authority of the Foundation and its subsidiary, First National Company, gave P & B an option to purchase the Moore shares at $45.00 a share. P & B loaned $2,000,000 to Woodstock secured by a pledge of the Moore stock, which pledge was made by permission of the owners. The brokers through Woodstock gave First National Company an option to purchase 75,721 shares of the common stock of P & B, which carried the control of P & B. First National Company assigned its option on the P & B stock to the Foundation which exercised it. P & B exercised its option and purchased the Moore shares.

As of December 31, 1955 P & B had cash on hand of $953,335.53 and investments in government and other marketable securities totaling about $2,000,000. In order to make the loan to Woodstock and purchase the Moore stock, P & B liquidated its securities and borrowed additional money from a bank. The Comer Group had previously acquired the Moore shares by the use of Moore's assets and the shares were placed in the name of the Foundation.

The case pended in the District Court for about ten months. Discovery proceedings had been taken. On October 15, 1958, which was before the case had been assigned for trial, P & B sold the Moore stock back to the Foundation for $45.00 a share.

The District Court impressed a lien on the proceeds of sale for attorneys fees for plaintiffs' counsel. Plaintiffs then filed an amended complaint seeking to recover from the officers and directors of P & B operating losses sustained by P & B before the transaction was rescinded.

The only questions left for determination by the District Court were as to the allowance of attorneys fees to counsel for plaintiffs, the liability of the officers and directors of P & B for the operating losses sustained by P & B, and the appointment of a receiver.

The District Judge considered the matter of allowance of attorneys fees on the basis of whether the plaintiffs, as minority shareholders, were entitled to relief, rescinding the transaction. On this proposition the controlling evidence was uncontroverted. It remained only for the court to determine the legal consequences.

The District Judge was of the view that this evidence did not prove conspiracy or fraud. He found that the price paid for the Moore shares was not unfair or oppressive either to P & B or its minority shareholders. He held that the evidence did not show that the Comer Group actually exercised control over the directors and officers of P & B even though they had the right to control; that the operating losses were not attributable in whole or part to the Moore purchase. The court dissolved the attorneys' lien and dismissed the complaint.

On the issue whether the Comer Group exercised control, the transaction speaks for itself. The officers and directors of P & B entered into the transaction without making a proper investigation and without knowledge even as to who was behind the deal. They liquidated all the marketable securities of the company and made a loan to a corporation which had no assets other than the Moore stock:

Looking through the corporate maze, the deal was simply one whereby the majority shareholders were using corporate assets to finance their purchase of the stock. It is clear to us that it was not an arms length business transaction, but one which was entered into by a person dealing with himself. Without going into further detail, we think that, at least, constructive fraud was shown and that the District Court was mistaken in not so finding. *United States* v. *United States Gypsum Co.*, 333 U.S. 364.

It is well-settled that dominant or controlling shareholders who exercise control over a corporation are fiduciaries. *Pepper* v. *Litton*, 308 U.S. 295, 306; *Southern Pacific Co.* v. *Bogert*, 250 U.S. 483; *Seagrave Corp.* v. *Mount*, 212 F.2d 389; *Dale* v. *Thomas H. Temple Company*, 186 Tenn. 69. Some authorities hold that transactions between persons in control and the corporation are illegal and may be set aside irrespective of the fairness thereof. *Gillespie* v. *Branham*, 47 Tenn. App. 234, cert. denied by the Supreme Court of Tennessee on December 12, 1959; *Attalla Iron Ore Company* v. *Virginia Iron, Coal & Coke Co.*, 111 Tenn. 527.

If the transaction is regarded merely as one subject to "close scrutiny," in our judgment, it cannot withstand the light of day. Stripping P & B of its cash and marketable securities and requiring it to borrow money so that the Comer Group could finance their controlling shares certainly operated to the prejudice of P & B and its minority shareholders.

The evidence clearly disclosed the plan to acquire the control of P & B by the use of its assets. The defendants all participated in carrying it out.

A conspiracy is an agreement to perform an illegal act. It may be shown by direct as well as circumstantial evi-

dence. In our judgment, it was clearly established by the evidence.

It is no defense that plaintiffs did not exhaust their corporate remedies. Since P & B was under the control of the Comer Group, it would have been futile to resort to it. The fact that the case pended in the District Court for ten months before the rescission was made is pretty good proof of the unavailability of any adequate corporate remedy. Under the circumstances resort to such remedies was excused. *Akin* v. *Mackie*, 203 Tenn. 113; *Peeler* v. *Luther*, 175 Tenn. 454.

The District Court did not consider the right to allowance of attorneys' fees on the basis of the liability of defendants to rescind the transaction and the case must be remanded for that purpose. The fact that the defendants rescinded the transaction before the court had an opportunity to pass upon the merits of the case would not, in our judgment, defeat the right to compensation. The rescission, however, without the necessity of a trial must be taken into account in fixing fees along with other relevant factors.

A question was raised as to liability for interest on $2,700,000. We think it should be computed at the legal rate from the date of the commencement of this action (January 16, 1958) to the date of rescission (October 15, 1958) less credits for interest received by P & B from Woodstock Corporation and less dividends received by P & B from the Moore stock during said period. *Dale* v. *Thomas H. Temple Co.*, 186 Tenn. 69.

Relative to the operating losses, the District Court found as a fact that these were not attributable to the purchase of the Moore stock. In our judgment, this finding was not clearly erroneous. Nor do we find any error in

the refusal of the court to appoint a receiver for P & B, or in denying plaintiffs' motion under Rule 60(b).

The judgment of the District Court is reversed in Case No. 14790 and the cause remanded for further proceedings in conformity with this opinion. The judgment in Case No. 14823 is affirmed.

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vs.

MRS. GUILBERTA DAKIN MAGGIORE ET AL.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Argument 8

Was the transaction whereby the controlling stockholders of P & B caused said corporation to purchase from themselves 60,000 shares of an unlisted stock for $2,700,000, without the knowledge or consent of the minority stockholders, and for the purpose of financing their acquisition of control, a legal or an illegal transaction 8

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IN THE

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Restatement of Items (a), (b), and (c), United States Supreme Court Rule 40, is deemed necessary.

COUNTERSTATEMENT OF QUESTIONS PRESENTED.

Respondents submit that the several questions presented by the Petition are:

1. In view of the finding of the Circuit Court of Appeals that the defendants participated in a "plan to acquire control of P & B by the use of its assets" which was carried out by the controlling stockholder selling the corporation 60,000 shares of an unlisted stock for

$2,700,000 in a transaction which "was not an arms length business transaction", and a transaction which "cannot withstand the light of day" did the Circuit Court of Appeals erroneously fail to consider and give effect to the opinion of the Supreme Court of Tennessee in *Creighton, Trustee, v. Hayes et al.*, 209 Tenn. 364, in which the Tennessee Court declined to condemn a transaction involving a purchase of trust property by the trustee, the transaction having been " 'open, fair and above board' ", formally ratified by the beneficiaries ten years prior to the bringing of the action, and acquiesced in by the beneficiaries for thirty years.

2. Whether the Circuit Court of Appeals' findings with reference to the transaction hereinabove referred to in Question No. 1 that:

(a) "It is *clear* to us that it was not an arms length transaction, but one which was entered into by a person dealing with himself. * * * that, at least constructive fraud was shown and that the District Court was mistaken in not so finding." (Italics supplied).

(b) "If the transaction is regarded merely as one subject to 'close scrutiny,' in our judgment, it cannot withstand the light of day. Stripping P & B of its cash and marketable securities and requiring it to borrow money so that the Comer Group could finance their controlling shares *certainly* operated to the *prejudice of P & B and its minority shareholders.*" (Italics supplied).

(c) "The evidence *clearly disclosed the plan* to acquire the control of P & B by the use of its assets. The defendants all participated in carrying it out." (Italics supplied).

(d) "A conspiracy is an agreement to perform an illegal act. It may be shown by direct as well

> as circumstantial evidence. In our judgment, *it was clearly established* by the evidence." (Italics supplied).

constituted improper *de novo* conclusions or were not findings in accordance with the provisions of Rule 52(a) (Federal Rules of Civil Procedure) that the District Court's findings with reference to said transaction were "clearly erroneous".

COUNTERSTATEMENT OF FACT.

Concealing the transaction from minority shareholders (Appendix pages 176a, 208a, 209a, 161a, 174a, 175a, 253a, 254a, 211a through 220a, Respondents' Brief in Court of Appeals, pages 18, 19), the petitioners, some referred to in these proceedings as the Comer Group, with the active participation of the other petitioners, financed their 1956 purchase of control of Phillips & Buttorff Corporation, hereinafter sometimes P & B, by secretly and circuitously selling P & B @ $45.00 each 60,000 shares of the unlisted stock of Wm. R. Moore & Company for $2,700,000. (Appendix pages 184a-188a; Plaintiffs' Exhibit 13).

The plan was, briefly, carried out as follows: The Comer Group had previously purchased 99% of the stock of Wm. R. Moore Company at $43.50 per share. The Comer group's purchase of the Moore stock was financed by The Comer Group selling Wm. R. Moore Company (simultaneously with obtaining control) 26 blocks of stock in various dry goods store corporations (which had "cost" The Comer Group $2,694,758.06) for $5,000,000.00. Prior to this transaction, The Moore Company had been rich in cash, securities and real estate. The transaction consumed the liquid assets of the then controlled Wm. R. Moore Company and caused it to incur a long-term debt,

secured by mortgage of its realty, of $2,500,000. (Appendix, pages 84a, 85a, 201a-204a, 300a-302a). The earnings of Moore (Appendix page 40a) declined after its purchase by petitioners from $3.39 per share in 1954, to $3.07 in 1955, to $2.32 in 1956. The Moore Company had paid no dividend in the two years preceding Phillips & Buttorff's purchase of said stock. (Appendix, page 40a).

Phillips & Buttorff Corporation, prior to acquisition of control by petitioners, operated profitably; in the ten year period ending July 1, 1956, P & B earned $6,000,000 before taxes. From July 1, 1956, when petitioners took charge as majority stockholders, until June 1, 1960, operating losses amounted to $1,848,954.35, net loss after carry-back tax refund, $1,681,456.16. (Appendix, page 236a). Liquidation value of P & B stock per share before acquisition of control by petitioners was $50.00; this declined to $33.00 by January, 1960, twice the amount then being paid on the market for shares of P & B stock. (Appendix, page 272a).

Dividends on the Moore stock and payments of interest by some of the parties along the circuitous route devised for accomplishment of the sale of the Moore stock to P & B, amounted to $104,399.00 less than simple interest on the $2,700,000 taken from P & B for purchase of its own stock for petitioners. (Appendix pages 71a, 176a).

Prior to institution of suit, minority stockholders unsuccessfully sought information about the transaction for many months. At the stockholders meeting of January 14, 1958, minority stockholders introduced a resolution that the purchase of the Moore stock for $2,700,000 be rescinded; the holder of the proxy of the majority stockholder (The Comer Group) voted against and defeated the resolution. (Appendix pages 315a-317a). After the bringing of this suit a great volume of testimony was

taken from the defendants on discovery and approximately eight months after institution of suit the directors voted to rescind the purchase of the Moore stock as demanded and, no other purchaser offering or coming forward, the petitioners repurchased at the same price paid them. (Appendix page 93a).

Purchase of the Moore stock by P & B from its majority stockholder had required use of all its cash, the liquidation of its readily marketable securities and so impaired its working capital that it was, for a period, unable to discount its bills. (Appendix, page 281a).

In concealing the transaction from the minority stockholders, the petitioners followed a complicated and circuitous route. Petitioners caused the Stockbroker defendant, J. C. Bradford & Company, to purchase 55,000 shares of P & B stock on credit and to at once elect one B. R. Prall Chairman of the Board of P & B; at a Directors' meeting September 6, 1956, Prall presented a contract whereby P & B would loan Woodstock Corporation (a "financing instrumentality" of Bradford with but $1,000 capital) $2,000,000 at 5½% interest, later $3,000,000, to be secured by 67,500 shares of Wm. R. Moore Company stock (put up by The Comer Group). Woodstock Corporation also gave P & B an "option" to buy the Moore stock at $45.00 per share, a profit price stipulated by the Comer Group. It was not disclosed, but understood, that the $2,000,000 loaned to Woodstock (later increased to $3,000,000) would have to be at once used by Woodstock in paying Bradford's short term bank indebtedness incurred in purchasing P & B stock at the order of P & B's new majority stockholder. Woodstock had no assets except the Moore stock which petitioners' group had provided for its use as collateral on the loan, and could only repay the loan if

P & B bought the stock at the price stipulated. The "option" was in reality a contract to purchase.

Prall did not tell, and apparently no Director asked, who owned and was selling the Moore stock; Nielson, Bradford's partner, also newly elected Board member of P & B, knew but did not inform other members of the Board. There was no negotiation as to price. The transaction was not consummated until July 1, 1957, one day after the end of P & B's fiscal year. The company's fiscal year-end statement, mailed out to stockholders on October 10, 1957, limited information of the then $2,000,000 loan to Woodstock to the cryptic item, "Accounts receivable, from customers and others—$2,781,027.00". The purchase of the stock inevitably followed the loan and "Option" and was consummated July 1, 1957; the letter of October 10, 1957, transmitting P & B's year-end statement, made no mention of the three month old transaction. (Appendix, pages 208a-209a). The President and Treasurer, also a Director, explained this by insisting that minority stockholders were not told because "they never asked". (Appendix, pages 161a, 174a, 175a, 253a-254a). Disclosure came only after searching correspondence between Young, a minority stockholder, and Lawrence, President of P & B, and after Lawrence had given evasive answers. (Appendix, pages 211a through 220a).

Prall had been instructed not to disclose the majority stockholder's identity and the President selected and elected by him was not himself permitted to learn who actually controlled P & B. (Appendix, page 243a).

The principal business of Phillips & Buttorff was the manufacture of appliances. Wm. R. Moore Company was a dry goods concern, although one of the blocks of corporate stock used by petitioners in stripping Moore of its cash

and liquid assets was a hardware company. There was no evidence that Wm. R. Moore Company increased its purchases of P & B appliances or promoted their sale after the purchase of Moore stock by P & B, and in fact, P & B's President, Lawrence, had no knowledge of Moore's business, nor even of the location of its drygoods stores.

The petitioners' acquisition of control of P & B through use of its own funds was a written "alternate plan" (Plaintiffs' Exhibit No. 13) to a plan originally considered under which petitioners would have secured open market financing from Commercial Credit Company. This plan would have limited petitioners to pay no more than $40.00 per share for P & B stock (they paid as high as $45.00), would have required petitioners to acquire a minimum of 66-2/3% of P & B's stock (as against slightly more than 50%), would have required petitioners to pledge not only the P & B stock acquired, but also the Wm. R. Moore Company stock, and repayment of the loan within one year, with interest at 6-1/2%. *Use of open market or Commercial Credit Company financing would also have required petitioners to permit minority stockholders to have participated in any partial liquidation of P & B assets:* "Proceeds of the sale of any of the company's (P & B's) assets to be distributed ratably as a partial redemption of stock to *all stockholders*" (Emphasis ours)

The profitable advantages of the "alternate plan" to the petitioners was obvious. (Appendix, pages 197a, 198a).

It was insisted by the petitioners that P & B received "benefits and advantages" from the transaction because it obtained "control" of Wm. R. Moore Company—although it was itself by the same transaction placed under the control of those "surrendering" control of Wm. R. Moore. Petitioners offered evidence that the stock of Wm. R. Moore

would be worth $45.00 per share inasmuch as "control justifies payment of a premium for stock".

Against these nebulous advantages, the transaction required that P & B sacrifice its liquidity, strip itself of its operating capital, sacrifice its discounts otherwise available upon its prompt payment of its accounts, and lose the legally implicit benefit of a Board of Directors obligated only to pursue that course of action fairly believed to be in the best interests of the Company and its stockholders. Although tremendous losses were suffered commencing immediately after petitioners obtained control of P & B, its Board of Directors "did not even consider liquidation". (Appendix, pages 311a, 319, 293a, 294a).

The secret and circuitous transaction required of them by the majority stockholder had committed them to a contrary course.

ARGUMENT.

1. The basic question involved in these proceedings and brought before this Court by the petition for a writ of certiorari, is:

Was the transaction whereby the controlling stockholders of P & B caused said corporation to purchase from themselves 60,000 shares of an unlisted stock for $2,700,000, without the knowledge or consent of the minority stockholders, and for the purpose of financing their acquisition of control, a legal or an illegal transaction?

It is true that the respondents (the plaintiffs below) in the District Court, and in the Circuit Court of Appeals, from a legal standpoint, argued that question on a two-fold or alternative basis. (a) It was argued that, under the holding of the Tennessee courts in *Gillespie* v. *Bran-*

ham, 47 Tenn. App. 234, such an admitted self-dealing transaction was illegal, irrespective of the issue of fairness or unfairness, and irrespective of whether it was advantageous or disadvantageous to the corporation; and, in the alternative (b) it was contended by respondents in the courts below that, even if that strict rule was not followed, that under the "close scrutiny rule" (which was the rule applied by the District Court), the transaction would not withstand the light of day and was disadvantageous to the corporation.

Petitioners' position is almost entirely based upon the erroneous assumption and contention that the Circuit Court of Appeals, in reversing the District Court, was applying the strict rule, as advanced in the *Gillespie* v. *Branham* case, *supra*.

It is obvious that the Circuit Court of Appeals, while recognizing the above-referred to, so-called strict rule, did not apply that rule, but pointed out with great emphasis that the transaction couldn't begin to stand up under the more liberal "close scrutiny rule".

> "If the transaction is regarded merely as one subject to 'close scrutiny', in our judgment, it cannot withstand the light of day. Stripping P & B of its cash and marketable securities and requiring it to borrow money so that the Comer Group could finance their controlling shares certainly operated to the prejudice of P & B and its minority shareholders."
>
> *Page A4, Appendix to Petition for Writ of Certiorari.*

Opposing counsel proceed on the assumption that the transaction attacked by the minority stockholders was fair and advantageous to the corporation, and, therefore, unless the strict rule announced in the *Gillespie* v. *Branham* case is applied, there was no basis for reversing the Dis-

trict Court. Apparently, it is their further contention that the later decision of the Supreme Court of Tennessee, in the case of *Creighton, Trustee*, v. *Hayes et al.*, 209 Tenn. 364, in effect, repudiated the position taken by the Tennessee Court of Appeals in the *Gillespie* v. *Branham* case, *supra*.

We respectfully submit that they are wrong on both points.

Some, but by no means all, of the obvious disadvantages of the Moore deal to P & B are, as follows:

1. The purchase of the Moore stock by P & B from its majority stockholder required the use of all of its cash and required it to liquidate virtually all of its highly liquid and readily marketable securities, with the result that its working capital was seriously impaired, and, for a period, the corporation, admittedly, could not discount its bills.

2. The Moore stock was not worth $45.00 per share to P & B. Approximately 99% of the Moore stock had been acquired by Comer two years before for $43.65, or a total cost of $5,000,000. The Comer Group financed its purchase of the Moore stock by selling to Wm. R. Moore & Company blocks of stocks of twenty-six various dry goods and hardware concerns in Middle Tennessee and Kentucky at a profit to the Comer Group of 100%. Thus, as a result of Comer's acquisition of the Moore stock, Wm. R. Moore & Company was virtually depleted of its cash, had been required to trade its readily marketable and highly liquid securities for stocks (mostly unlisted and untraded in) in twenty-six Comer enterprises, and incurred a long-term debt of $2,500,000. Even if the Moore stock had been worth $43.65 per share before Comer came into the picture it was certainly worth far less after that questionable transfusion of assets. Even the three men employed by the defendants to evaluate the Moore stock, after the in-

stitution of this litigation, for the purpose of reporting to the defendants as to whether or not $45.00 per share was a fair price for said Moore stock, in their report admitted that the price of $45.00 per share could only be justified on the basis of "control" of Wm. R. Moore & Company. The Comer Group, holding the majority stock in P & B, already owned 99% of the Moore stock and, at the same time, owned control of P & B. There was no conceivable value to P & B, under those circumstances, to "technically" shift control of Wm. R. Moore & Company to P & B by selling 51% of the Moore stock to P & B for $2,700,000. It is admitted in the record by the defendants that when P & B was forced to divest itself of the Moore stock, in 1958, and sought to find some purchaser other than the original seller, the Comer Group, the search was wholly unsuccessful.

3. The purchase of the Moore stock by P & B closed the doors to a consideration of liquidation. Prior to the assumption of control by the defendants, P & B had unencumbered valuable real estate and a tremendous amount of cash and highly liquid securities. According to the testimony of the defendant, Blackman, Treasurer of P & B, the Company probably could have been liquidated for approximately $50.00 per share. Under all the circumstances, those in charge should have done nothing to prevent or to encumber the opportunity of liquidation. The purchase of the Moore stock, however, made liquidation thoroughly impractical, if not wholly impossible. The Moore stock was not a liquid asset and, admittedly, there was no market for same. The cash and liquid securities previously held by P & B could have been easily liquidated or distributed in kind, without diminution of value. If the Moore stock had been distributed in kind and divided up among P & B stockholders, the "premium" represented by "control" would have been extinguished. Thus, after Mr. Prall put

through the contract with the P & B Board of Directors, for the Woodstock-Moore deal, in September, 1956, the company was committed to continue operations, win, lose or draw.

The Circuit Court of Appeals rejected the position taken by the District Court and found that the evidence clearly showed that the transaction was highly prejudicial to P & B.

> "It is *clear* to us that it was not an arms length transaction, but one which was entered into by a person dealing with himself. Without going into further details we think at least constructive fraud was shown and the District Court was mistaken in not so finding.
>
> * * *
>
> Stripping P & B of its cash and marketable securities and requiring it to borrow money so that the Comer Group could finance their controlling shares *certainly* operated to the prejudice of P & B and its minority shareholders". (Italics supplied).

Of course, there are numerous authorities in Tennessee, as well as elsewhere, that hold that a court will scrutinize carefully any transaction between a fiduciary and the funds and assets controlled and handled by that fiduciary, and set the transaction aside if it should be held to be even slightly disadvantageous to the beneficiaries of the trust or the minority stockholders of a corporation. This rule, as announced in the case of *Rothchild v. Memphis C. R. Company*, 113 Fed. 467, was expressly recognized and said case cited by the District Court in its opinion. We quote from that case:

> "It is true that every transaction of a majority stockholder with the corporation will be viewed by the courts with jealousy, and *set aside on slight grounds*; * * *." (Emphasis supplied).

We are confident that opposing counsel take no issue with that rule, as so pronounced.

It was that "close scrutiny rule" that was followed by the Circuit Court of Appeals, and, therefore, the contentions made by opposing counsel that the "strict rule" announced in the Tennessee case of *Gillespie* v. *Branham*, *supra*, was repudiated or materially modified by a later pronouncement of the Supreme Court of Tennessee in the case of *Creighton, Trustee,* v. *Hayes et al., supra*, becomes wholly academic.

Nevertheless, we are reluctant to leave unchallenged, opposing counsel's contention that the decision of the Tennessee Supreme Court in the case of *Creighton, Trustee,* v. *Hayes et al., supra*, upon any theory, gives comfort to the defendants in this case. We submit that the Tennessee Supreme Court in said *Creighton* case affirmed, rather than rejected, the principle announced in the *Gillespie* v. *Branham* case, but did state that that "strict rule" would not be applicable with respect to a transaction where a fiduciary dealt with the corpus of the trust in a fair, open and above board manner, with full knowledge of and disclosure to the beneficiaries affected, and where the transaction, in addition to being formally ratified by the beneficiaries, with full knowledge, was acquiesced in by the beneficiaries for thirty years.

2. The second position taken by opposing counsel in petitioners' writ is that:

> "The Circuit Court of Appeals improperly substituted its view that the transaction was 'prejudicial' and 'illegal' for the District Court's finding of fact that it was 'fair and advantageous'."

Here, again, we have opposing counsel basing their argument on an erroneous premise. Opposing counsel erro-

neously contend and assume that the Circuit Court of Appeals made its own findings *de novo*, inasmuch as the findings of the trial court constituted nothing more than inferences from undisputed, underlying facts, rather than reaching a conclusion that the District Court's findings were "clearly erroneous", as required by Rule 52(a), as a basis for an appellate court's rejection of a finding of a trial court.

The position taken by the respondents, as appellants in the Circuit Court of Appeals, with respect to the appellate court's burden and obligation as to affirming or rejecting the findings and conclusions of the trial court, was two-fold and alternative:

(a) In view of the fact that the bulk of the proof in the trial court was in the form of depositions and was in the form of documentary evidence, and, also, because the findings of the trial court amounted to nothing more than factual and legal inferences from undisputed, underlying facts, that Rule 52 was inapplicable, and the findings of the trial court were not presumptively correct (See *Seagraves* v. *Mount*, 212 F.2d 389); or, in the alternative,

(b) That even if the Circuit Court of Appeals deemed, under the circumstances, that Rule 52(a) was applicable, that appellants readily accepted that challenge and asserted that, under the undisputed facts, the findings of the trial court were "clearly erroneous", in accordance with the rule set down in Rule 52(a).

We submit that opposing counsel are clearly wrong in their contention and position that the Circuit Court of Appeals did not apply the "clearly erroneous rule" set forth in Rule 52(a). After summarizing the underlying, undisputed facts, briefly, the Circuit Court of Appeals made these pronouncements:

"Looking through the corporate maze, the deal was simply one whereby the majority shareholders were using corporate assets to finance their purchase of the stock. It is *clear to us that it was not an arms length business transaction*, but one which was entered into by a person dealing with himself. Without going into further detail, we think that, at least, constructive fraud was shown and that the District Court was mistaken in not so finding. United States v. United States Gypsum Co., 333 U.S. 364." (Italics supplied).

* * *

"If the transaction is regarded merely as one subject to 'close scrutiny,' in our judgment, it cannot withstand the light of day. Stripping P & B of its cash and marketable securities and requiring it to borrow money so that the Comer Group could finance their controlling shares *certainly* operated to the *prejudice of P & B and its minority shareholders.* (Italics supplied)

"The evidence *clearly disclosed the plan* to acquire the control of P & B by the use of its assets. The defendants all participated in carrying it out.

"A conspiracy is an agreement to perform an illegal act. It may be shown by direct as well as circumstantial evidence. In our judgment, *it was clearly established* by the evidence." (Italics supplied)

In view of those emphatic pronouncements by the Circuit Court of Appeals, it seems almost frivolous from opposing counsel to argue that the Circuit Court of Appeals did not find the trial court's pertinent conclusions and findings "clearly erroneous", in accordance with Rule 52(a).

Any possible doubt in this connection is removed by a consideration of the statement of the Circuit Court of Appeals with respect to a finding of the District Court which the Circuit Court of Appeals did not overrule and reject.

> "Relative to the operating losses, the District Court found as a fact that these were not attributable to the purchase of the Moore stock. In our judgment, this finding *was not clearly erroneous.*" (Italics supplied)

Certainly, it would be difficult, if not impossible, to reasonably conclude that the Circuit Court of Appeals would have rejected certain findings of the trial court, without applying the "clearly erroneous" rule, and, in the same opinion, fail to reject other findings and conclusions of the trial court on the basis of the "clearly erroneous" rule.

With respect to a record of the kind in this case, the attempt to precisely characterize the burden the appellants must bear in order to successfully attack the findings of a trial court, in the last analysis, reduces itself to a game in "semantics".

One of the leading cases on this very point is the opinion of the Supreme Court in *United States* v. *United States Gypsum Company et al.*, 333 U.S. 364, 92 L. Ed. 746, in which case the Court, at page 395, said:

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

Further on, in this same case, the Supreme Court said:

> "Where such testimony is in conflict with contemporaneous documents we can give it litfle weight, *particularly when the crucial issues involve mixed questions of law and fact*". (Emphasis supplied)

The Supreme Court has also recognized that the trial court's efforts to find "ultimate" facts, of necessity, usually results in the finding of a mixed question of law and fact.

In the case of *Baumgartner* v. *United States*, 322 U.S. 665, 88 L. Ed. 1525, Judge Frankfurter, speaking for the majority, said:

> "Finding so-called ultimate 'facts' more clearly implies the application of standards of law".

On this same subject, the Court of Appeals for the Fifth Circuit had this following interesting observation to make, which we think is pertinent to the discussion here:

> "*The burden is lighter, much lighter*, when we consider logical inferences drawn from undisputed facts or from documents, though the 'clearly erroneous' rule is still applicable. United States v. United States Gypsum, supra; Benton v. Commissioner of Internal Revenue, 5 Cir., 197 F.2d 745, 753. Insofar, however as the so-called 'ultimate fact' is simply the result reached by processes of legal reasoning from, or the interpretation of the legal significance of, the evidentiary facts, it is subject to review free of the restraining impact of the so-called "clearly erroneous" rule.' Lehmann v. Acheson, 3 Cir., 206 F.2d 592, 594. As succinctly stated by Professor Moore, '*Findings of fact that are induced by an erroneous view of the law are not binding. Nor are findings that combine both fact and law, when there is error as to the law.*' 5 Moore's Federal Practice, 2nd Ed., Sec. 52.03 (3), p. 2631". (Emphasis supplied)
>
> *Galena Oaks Corporation* v. *Scofield*, 218 F.2d 217, 219.

Opposing counsel have argued that this Court should grant certiorari because the District Court's "inferences from proven facts have not been respected", by the Circuit Court of Appeals. The effect of this argument is to ask this Court to scrap, altogether, Rule 52(a) that authorizes an appellate court to reject a trial court's findings if the appellate court concludes that such findings are "clearly

erroneous". The effect of this argument would be to compel and require this Court to grant certiorari in every non-jury case where the Circuit Court of Appeals rejects or modifies a findings of fact made by the trial court.

3. For the reasons hereinabove set forth, it is respectfully submitted that the decision of the Circuit Court of Appeals was in no way contrary to the decision of this Court (*Commissioner of Internal Revenue* v. *Duberstein*, 363 U.S. 278, 279), and in no way contrary to the applicable law of Tennessee, as declared by its Supreme Court (*Creighton, Trustee*, v. *Hayes et al.*, 209 Tenn. 364), and that no procedural questions arising out of a conflicting interpretation of Rule 52 of the Federal Rules of Civil Procedure are involved.

4. In Section 4 of opposing counsel's brief, entitled "REASONS FOR GRANTING WRIT", the contention is made that a serious conflict in the construction and application of the Federal Rule of Decision Statute and the construction of Rule 52 of the Federal Rules of Civil Procedure exists among the various Circuit Courts of Appeal which should be settled by this Court. It is true that there have been certain opinions of various Circuit Courts of Appeal holding that, when the findings of the trial court are mere inferences based upon undisputed, underlying facts, the "clearly erroneous" rule, as asserted in Rule 52(a), is inapplicable. However, as argued and asserted by opposing counsel in their brief in the Circuit Court of Appeals, in this case, any conflicts created by those pronouncements have already been resolved and put to rest by the decision of this Court in the case of *Commissioner of Internal Revenue* v. *Duberstein*, 363 U.S. 278, 291. In view of that position of opposing counsel in the Circuit Court of Appeals, and, indeed, in this Court, in their petition, the last contention made in Section 4 of their petition that a conflict

exists which this Court should put to rest, appears to border on the frivolous.

Furthermore, even if such a conflict exists and has not been resolved by this Court, that is, whether or not an appellate court may disregard the "clearly erroneous" rule announced by Rule 52(a), when reviewing findings in the nature of mere inferences based on undisputed facts, no problem exists here, in this case under consideration, inasmuch as the Circuit Court of Appeals plainly recognized the "clearly erroneous" principle announced by Rule 52(a) and gave said Rule full application in holding that the trial court's finding with respect to the transaction under consideration was, indeed, "clearly erroneous".

CONCLUSION.

For the reasons stated hereinabove, it is submitted that the decision of the Circuit Court of Appeals is correct. No conflict of decisions is involved. No applicable decision of the State of Tennessee has been ignored or rejected.

Respectfully submitted,

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